In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1538

ROBERT V. RAFTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. In April, 1967, petitioner commenced proceedings in the Tax Court seeking a redetermination of income tax deficiencies for the years 1963–1966 of approximately $2,900, which resulted from the Commissioner's disallowance of certain claimed deductions for litigation expenses and a purported theft loss (Pet. App. A3–A4). Petitioner, a lawyer, appeared *pro se* at the trial in December 1968 (Pet. 2).

At the close of his testimony, petitioner voluntarily rested his case even though several of his witnesses had failed to appear. Petitioner did not request a recess, or continuance, but stated (Tr. 131):

> MR. RAFTER. I find that two witnesses from my—I frankly don't know whether they were served or not. I know I tried to get them

served. They have not appeared and I will not take up further time of the Court and this does conclude my testimony, my case.

The COURT. The petitioner rests then at this time?

Mr. RAFTER. Yes, your Honor.

Approximately three weeks later, petitioner filed a motion in the Tax Court to reopen the record to take the testimony of the witnesses who had not appeared at trial. The motion was denied[1] (Appendix, *infra*, pp. 6, 10).[2] Petitioner thereupon filed a motion in the United States District Court for the Southern District of New York to enforce the Tax Court subpoenaes of these witnesses. That motion was denied in May, 1969 (Motion 35–37).[3] On October 31, 1969, petitioner renewed his motion in the Tax Court for further trial. This motion was denied on November 12, 1969 (Appendix, *infra*, pp. 7, 10).

In June, 1970, petitioner filed a mandamus petition in the court of appeals requesting it to order the Tax Court to reopen the record. The petition was denied on June 18, 1970 (Motion 13–19). On Septem-

[1] This was the first of numerous similar motions in which petitioner sought to have the record reopened. The Tax Court denied these motions because petitioner had voluntarily rested his case and because he had not shown what evidence the missing witnesses would offer or even whether they had evidence not otherwise available to petitioner (60 T.C. 1, 9, n. 5). Cf. *ARC Realty Co.* v. *Commissioner*, 295 F. 2d 98 (C.A. 8).

[2] We have attached as an Appendix hereto a copy of the docket entries of the Tax Court.

[3] "Motion" references are to a Motion for Leave to File a Petition for a Writ of Mandamus filed by petitioner in this Court on January 26, 1971. That motion was denied. *Rafter* v. *Hoyt*, 401 U.S. 1008.

ber 29, 1970, petitioner sought from this Court a stay of the Tax Court proceedings pending a disposition by this Court of his motion for leave to file a petition for a writ of mandamus. The stay was denied on November 11, 1970, and the motion was denied on April 5, 1971 (Motion 11).

On December 12, 1972, the Tax Court advised the parties that due to the prolonged and continuing illness of the trial judge, the case was to be reassigned for disposition to another judge (Pet. App. A9). Petitioner did not object to the reassignment. However, in a motion filed on January 4, 1973, he again requested that the record be reopened for further proceedings. That motion was denied on January 18, 1973 (Appendix, *infra*, pp. 7, 10). After the Tax Court filed an opinion adverse to the petitioner on April 2, 1973, petitioner filed a motion for retrial which was denied on May 4, 1973 (Appendix, *infra*, pp. 7–8, 10–11). On May 25, 1973, the Tax Court entered its decision holding against petitioner (Appendix, *infra*, pp. 8, 11). The court of appeals affirmed (Pet. App. A1–A2).[4]

2. Petitioner argues (Pet. 3) that the delay between the trial of this case (December 1968) and the final decision by the Tax Court (May 1973) is contrary to Section 7459(a) of the Internal Revenue Code of 1954, which provides that a Tax Court de-

[4] In his brief in the court of appeals, petitioner sought a reversal of the Tax Court decision based on (i) the alleged error of the Tax Court in disallowing a claimed "theft loss" deduction and (ii) a claimed denial of a fair trial which petitioner argued resulted from the denial of a motion for pretrial discovery and his various post-trial motions to reopen the record.

cision is to be issued "as quickly as practicable." But much of the delay between the trial and the decision is directly attributable to the numerous motions filed by petitioner in the Tax Court, the court of appeals, and in this Court seeking to reopen the proceedings and to prevent the Tax Court from rendering its decision. After the last of petitioner's post-trial attempts to secure a writ of mandamus was concluded in this Court in April, 1971, the Tax Court, due to the continuing illness of the trial judge, reassigned the case to another judge for decision in December, 1972. The case was decided shortly thereafter in April, 1973.

Under these circumstances, the decision was in fact issued "as quickly as practicable" in accordance with Section 7459(a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

APPENDIX

TAX COURT OF THE UNITED STATES
GENERAL DOCKET

DOCKET NO. 2044-67

CLASS

ROBERT W. BAFFER
[illegible] Main Beach Road, One North Avenue,
Weston, Connecticut 06883 PETITIONER.
VS.
COMMISSIONER OF INTERNAL REVENUE. RESPONDENT.

APPEARANCES FOR PETITIONER:
NAME
ADDRESS

Date Month Day Year	Filings and Proceedings	Action	Served
Apr. 25, 1967	PETITION FILED. FEE PAID Apr. 25, 1967		Apr. 25, 1967
June 21, 1967	REQUEST by Resp. for trial at New York, N.Y.	GRANTED 6/21/67	June 22, 1967
June 21, 1967	ANSWER filed by Resp.		JUN 22 1967
Feb. 27, 1968	APPLICATION by petitioner for order to take depositions of Cloud Wampler, William Bymm, Melvin Holm, Thomas Deegan, Charles Lane, Fairfield County Trust Company, Floyd Blackmon, Vincent Tirola, Joseph Simone, James Graesele, Sidney Spector, Daniel Coughlin, John Garrity, Joseph Hannivar, Thomas Spear, Horace Flannagan, Donald Hays and Alexander Kellegrew, at New York, N. Y.	DENIED by ORDER March 20,1968.	
Feb. 25, 1968	NOTICE of filing of application to take depositions of 18 witnesses, to Respondent (OBJ. due on or before March 13, 1968)		FEB 2 8 1968
Mar. 11, 1968	NOTICE of objection to application to take depositions of 18 witnesses, filed by Resp.		Mar. 12, 1968
March 12,1968	NOTICE of HRG. March 20,1968 Wash. D.C. on petrs application to take deposition (of the above named)		MAR 12 1968

Form No. 11
March 1967

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 2044-67

Date Month Day Year	Filings and Proceedings	PETITIONER Action	PAGE Served
	and respondent's objection thereto.		
March 19,1968	Petitioners Memorandum in support of Application for Order to take Dep.		March 27, 1968
March 20,1968	HEARING before Judge Arundell - Wash. D.C.		
	Petitioners application to take depositions - Denied		
March 20,1968	ORDER that petr's application for order to take depositions		March 27,1968
	is denied. Judge Arundell		
Sept. 3, 1968	NOTICE of Trial on Dec. 2, 1968 at New York, N.Y.		Sept. 3, 1968
Nov. 5, 1968	MOTION by resp. to calendar Docket 1976-68 for trial at		
	New York, N.Y., on Dec. 2, 1968, and to consolidate		
	2044-67 & 1976-68 for trial, briefing and opinion,		
	or in the alternative to continue.	GRANTED 12/2/68	
Nov. 15, 1968	NOTICE of Filing of motion by resp. to calendar and		
	consolidate or in the alternative continue, and		
	Hearing on Dec. 2, 1968 at New York, N.Y.		Nov. 15, 1968
Dec. 2,4,5,1968	TRIAL at New York, N.Y. before Judge Hoyt.		
	Resp's Motion to Calendar and Consolidate 2044-67 &		
	1976-68 for Trial, Briefing and opinion-GRANTED-12/2/68.		
	Served Dec. 10, 1968.		
	Stipulation of Facts filed.		
	PETR'S ORIGINAL BRIEF DUE - Feb. 3, 1969		
	RESP'S ANSWER BRIEF DUE - March 20, 1969		
	PETR'S REPLY BRIEF DUE - April 21, 1969		
	UNDER SUBMISSION - JUDGE HOYT		
Dec. 24, 1968	MOTION by petr. for further trial.	DENIED 1/1/69	Jan. 6, 1969
Jan. 10,1969	TRANSCRIPT of trial proceedings of Dec.2,4,5, 1969 rec'd. (3-Vols)		
Feb. 4, 1969	BRIEF for Petitioner filed		Feb. 4, 1969

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 2011-67

DATE	Filings and Proceedings	PETITIONER Action	PAGE Served
March 20, 1969	REPLY IN ANSWER filed by respondent.		March 24, 1969
April 22, 1969	REPLY filed by petitioner.		April 23, 1969
Oct. 31, 1969	ORDERED MOTION for further Trial, filed by Petr.	DENIED Nov. 12, 1969	Nov. 13, 1969
Dec. 12, 1972	NOTICE of Reassignment - Should any motions be contemplated		Dec. 18, 1972
	in connection with this proceeding, they should be		
	addressed to Chief Judge Drennen and filed immediately.		
	If no such motions are received within 15-days this		
	proceeding will be assigned to another Judge who will		
	proceed with the disposition thereof. Judge Drennen		
Dec. 27, 1972	ORDER of Reassignment - Case reassigned to		Jan. 17, 1973
	JUDGE FEATHERSTON		
Jan. 4, 1973	MOTION by Petr. for a rehearing, reargument,		
	retrial, further trial and reconsideration.	DENIED Jan. 18, 1973	Jan. 22, 1973
	(OK to file per Judge Drennen)		
Apr. 2, 1973	FINDINGS OF FACT AND OPINION filed, Judge		
	Featherston.		
	Decision will be entered for the Resp.		Apr. 2, 1973
May 1, 1973	MOTION by Petr. for retrial, further trial		
	and reconsideration pursuant to Rule 19(e).		
May 4, 1973	ORDERED the following sentence be inserted at the open-		MAY 7 1973
	ing of the second paragraph of page 6 of Court's opinion (see order) cont'd to page		
	further, ORDERED that opinion of the court filed April		
	2, 1973 remain unchanged otherwise, petitioner's motion		
	for retrial, Further Trial and		

TAX COURT OF THE UNITED STATES
GENERAL DOCKET

DOCKET NO. 2044-67

(Continuation)

ROBERT V. RAFIER,

Date (Month, Day, Year)	Filings and Proceedings FEATHERSTON	PETITIONER Amount	PAGE Serial
MEMO 5/4/73	Reconsideration Pursuant to Rule 19,(e) be denied in all		
	other respects. Judge Featherston.		
May 25, 1973	DECISION ENTERED, Judge Featherston.		May 25, 1973
	APPELLATE PROCEEDINGS		
Aug. 15, 1973	NOTICE OF APPEAL to U.S.C.A., 2nd Cir., filed by Petr.		Aug. 23, 1973
Aug. 23, 1973	NOTICE of Filing with copy of Notice of Appeal sent to		
	Acting Chief Counsel.		Aug. 23, 1973
Aug. 23, 1973	NOTICE, to parties, of assembling and date for trans-		
	mission of record.		Aug. 23, 1973

TAX COURT OF THE UNITED STATES
GENERAL DOCKET

DOCKET NO. 3976-68

CLASS

ROBERT V. RAFTER,
~~Nos 20 Old Rock Road~~ One North Avenue,
Weston, Connecticut 06880

PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

APPEARANCES FOR PETITIONER:

NAME

ADDRESS

Date Month Day Year	Filings and Proceedings	Action	Served
Aug. 19, 1968	PETITION FILED: FEE PAID August 19, 1968		Aug. 20, 1968
Oct 11, 1968	REQUEST by Resp. for trial at New York, New York	GRANTED Oct 15, 1968	OCT 1 6 1968
Oct 11, 1968	ANSWER filed by Resp.		OCT 1 6 1968
Nov. 5, 1968	MOTION by resp. to calendar Docket 3976-68 for trial at New York, N.Y., on Dec. 2, 1968, and to consolidate 2044-67 & 3976-68 for trial, briefing and opinion, or in the alternative to continue.	GRANTED Dec. 2, 1968	Dec. 10, 1968
Nov. 15, 1968	NOTICE of Filing of motion by resp. to calendar and consolidate or in the alternative continue, and Hearing on Dec. 2, 1968 at New York, N.Y.		Nov.15, 1968
Dec. 2-5, 1968	TRIAL at New York, N.Y. before Judge Hoyt. Resp's Motion to Calendar and Consolidate 2044-67 & 3976-68 for Trial, Briefing and Opinion - GRANTED-12/2/68. Served. Dec. 10, 1968. Stipulation of Facts filed. PETR'S OPENING BRIEF DUE - Feb. 3, 1969 RESP'S ANSWER BRIEF DUE - March 20, 1969 PETR'S REPLY BRIEF DUE - April 21, 1969		
	[illegible]		

Form No. 11
Rev. 1967

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 3976-68

(Corrected)

ROBERT V. PAFFER	SUBMITTED - JUDGE HOFT FEATHERSTON	PETITIONER	PAGE
Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 24, 1968	MOTION by petr. for further trial.	DENIED 1/3/69	Jan. 6, 1969
Jan. 10, 1969	TRANSCRIPT of trial proceedings of Dec. 2, 4 and 5, rec'd (3 Vols.)		
Feb. 4, 1969	BRIEF for Petitioner filed		FEB 4 1969
March 20, 1969	BRIEF IN ANSWER filed by respondent.		March 24, 1969
April 22, 1969	REPLY BRIEF filed by petitioner.		April 21, 1969
Oct. 31, 1969	RENEWED MOTION for further trial, filed by Petr.	DENIED Nov. 12, 1969	Nov. 13, 1969
Dec. 12, 1972	NOTICE of Reassignment - Should any motions be contemplated in connection with this proceeding, they should be addressed to Chief Judge Drennen and filed immediately. If no such motions are received within 15-days this proceeding will be assigned to another Judge who will proceed with the disposition thereof. Judge Drennen		Dec. 18, 1972
Dec. 27, 1972	ORDER of Reassignment - REASSIGNED TO JUDGE FEATHERSTON.		
Jan. 4, 1973	MOTION by Petr. for a rehearing, reargument, retrial, further trial and reconsideration. (OK to file Per Judge Drennen)	DENIED Jan. 18, 1973	Jan. 17, 1973 Jan. 23, 1973
Apr. 2, 1973	FINDINGS OF FACT AND OPINION filed, Judge Featherston. Decision will be entered under Rule 50.		Apr. 2, 1973
May 1, 1973	MOTION by Petr. for retrial, further trial and reconsideration pursuant to Rule 19(e).		
May 1, 1973	RULE 50 COMPUTATION filed by Respondent.		
May 4, 1973	ORDERED the following sentence be inserted at the opening of the second paragraph of page 6 of Court's opinion (see Order)		May 7, 1973

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TAX COURT OF THE UNITED STATES

GENERAL DOCKET

DOCKET NO. 3976-68

(Continued)

ROBERT V. BAFTER — PETITIONER — PAGE

Date Month Day Year	Filings and Proceedings	Amount	Served
(Order 5/4/73 continued:)	Further, ORDERED that opinion of the court filed April 2, 1973		
	remain unchanged otherwise, petitioner's motion for re-		
	trial, Further Trial and Reconsideration Pursuant to		
	Rule 19 (e) be denied in all other respects.		MAY 7 1973
	Judge Featherston.		
May 8,1973	NOTICE of filing of Computation under Rule 50		May 8,1973
	and hearing on May 23,1973 at Wash.D.C. (Cbs		
	due 5 days prior to hearing.);		
May 23,1973	HEARING at Wash. D.C. before Judge Scott.		
	Hearing under Rule 50. - Referred to Judge		
	Featherston.		
May 25, 1973	DECISION ENTERED, Judge Featherston.		May 25, 197
	APPELLATE PROCEEDINGS		
Aug. 15, 1973	NOTICE OF APPEAL to U.S.C.A., 2nd Cir., filed by Petr.		Aug. 23, 197
Aug. 21, 1973	NOTICE of Filing with copy of Notice of Appeal sent to		
	Acting Chief Counsel.		Aug. 23, 197
Aug. 23, 1973	NOTICE, to parties, of assembling and date for trans-		
	mission of record.		Aug. 23, 197

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